

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

H. ANAYA
 1940-1941

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

) CIVIL NO. 19-1-1134-07 GWBC
) (Other Civil Action)
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) COMPLAINT; EXHIBIT "A"; SUMMONS
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Native Hawaiians and members of the public have exercised kapu aloha - free speech and non-violent yet steadfast demonstration and opposition grounded in aloha and reverence for Mauna Kea.

In the wake of the public's strong opposition to the TMT, Governor David Y. Ige abused his executive authority to favor and accommodate TMT construction activities while suppressing and violating the rights of the public to express their opposition to the project and the rights of Native Hawaiians to honor, worship, and protect Mauna Kea. Instead of using a rational approach and available law and procedures to accomplish his goal of facilitating TMT construction, Defendant Ige issued a draconian emergency proclamation that allows him to operate outside of the protections and procedures provided by state laws with impunity.

Defendant Ige's weaponization of an emergency proclamation in the absence of a natural disaster or bona fide emergency abuses and exceeds his statutory authority to issue such proclamations in times of crisis and threats to the population of Hawai'i. Because of this proclamation, Plaintiff, a respected native Hawaiian kumu hula and cultural practitioner who resides on Hawai'i Island, and other Native Hawaiians will be prohibited from engaging in traditional and customary spiritual and religious practices on Mauna Kea. Plaintiff and all members of the public will also be prohibited from exercising their constitutionally protected rights to engage in free speech, religious exercise, freedom of movement, and assembly on Mauna Kea. None of these prohibitions are justified or lawful under the circumstances.

JURISDICTION

1. This Court has jurisdiction over the claims for relief in this action pursuant to HRS §§ 127A-27, 603-21.5, 603-21.9, 632-1, and Article XII § 7 of the Constitution of the State of Hawai'i.

2. Venue in this circuit is appropriate pursuant to HRS § 603-36(5) and 127A-27.

PARTIES

3. Plaintiff Paul Kevin Neves is a native Hawaiian who resides on Hawai'i Island and descends from the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawai'i. Plaintiff engages in traditional and cultural practices on Mauna Kea and is a beneficiary of both the ceded lands trust and the Hawaiian Home Lands trust.

4. Defendant Governor David Y. Ige is sued in his official capacity as the Governor

of the State of Hawai‘i. The office of Defendant Ige is located within this circuit at 1803 North King Street, Honolulu, Hawai‘i. Defendant Ige is otherwise domiciled in this circuit.

ALLEGATIONS

Constitutionally-Protected Conduct Traditionally Occurs On Mauna a Wākea

5. Since time immemorial Mauna Kea has been the site of Native Hawaiian traditional and customary practices, spiritual and religious worship, and free speech.

6. Mauna Kea has long been regarded as the most sacred place on the island by Native Hawaiians of the past and is still remembered and believed to be sacred by many Hawaiians today.

7. Mauna Kea is considered a temple and a site of pilgrimage as confirmed by the several hundred shrines found on the mountain. It has been and continues to be an important site for Native Hawaiians to conduct traditional, customary, and religious practices.

8. Mauna Kea is a significant cultural and natural resource.

9. The number, variety, and significance of the historic properties located on Mauna Kea is unusual and has no parallel in Hawai‘i.

10. At least 263 archaeological sites have been identified in the summit area of Mauna Kea alone.

11. Portions of Mauna Kea are listed in the National Historic Register and are designated as National Natural Landmarks.

12. Lake Wai‘au, a site documented for its historic significance and cultural practices that continue to this day, is located on Mauna Kea.

13. Pu‘u Huluhulu, a site documented for its historic significance and cultural practices that continue to this day, is located on Mauna Kea.

The TMT Project

14. In 2003, Caltech and the University of California formed TMT Corporation.

15. In 2008, the TMT Corporation began assessing the development of the Thirty Meter Telescope on the summit of Mauna Kea.

16. The proposed TMT observatory is planned to be roughly 180 feet high with an exterior radius of 108 feet and a dome shutter 102.5 feet in diameter.

17. The proposed TMT observatory will have a construction footprint over 8 acres,

and will be the tallest building on Hawai'i Island and the largest development on Mauna Kea.

18. The proposed TMT observatory will be located within the northern plateau of the Mauna Kea summit area, one of the last undeveloped areas on the summit.

19. The proposed TMT observatory will have adverse impacts to the environment by producing large amounts of solid and liquid waste, noise pollution, and other impacts.

20. Native Hawaiian traditional and customary practices which occur at the TMT observatory site can no longer occur at the site once construction of the TMT begins.

Defendant Ige Orders Construction of the TMT to Proceed

21. On June 20, 2019, Defendant Ige announced in a press release that the State issued a notice to proceed with the construction of the TMT.

22. In the press release, Attorney General Clare E. Connors admitted the State intends to ensure the construction of the TMT to further astronomical discovery.

23. On July 10, 2019, Defendant Ige, together with the Thirty Meter Telescope International Observatory, announced that the TMT would begin construction the following week.

24. On the morning of July 15, 2019 law enforcement officers "swept" Mauna Kea of all members of the public and prohibited all members of the public, including Native Hawaiians wishing to conduct traditional and customary practices, access to Mauna Kea via Mauna Kea Access Road and Mana Road, public right of ways.

The Public Engages In Constitutionally-Protected Conduct Opposing Defendant Ige's Support Of the TMT

25. Following Defendant Ige's announcement, Plaintiff and other Native Hawaiians engaged in a traditional and customary Native Hawaiian practice by recognizing a portion of Pu'u Huluhulu, a site of traditional, spiritual, and cultural importance to Native Hawaiians located near the Mauna Kea Access Road, as a pu'uhonua, or refuge. The pu'uhonua is situated near the intersection of Saddle Road and Mauna Kea Access Road.

26. The Pu'u Huluhulu pu'uhonua was re-established in or about 1998 by members of the Royal Order of Kamehameha including Plaintiff. The pu'uhonua is set back a safe distance from Saddle Road and was intended to provide a safe protected place for all members of the public to remain free from threats of arrest, harm, or injury and to engage freely in constitutionally-protected conduct such as free speech, assembly, religious and Native Hawaiian

traditional and cultural practices.

27. The Pu‘u Huluhulu pu‘uhonua contains ‘ahu, or alter, used in traditional and customary Native Hawaiian practices. Plaintiff assisted in the creation of the Pu‘u Huluhulu ‘ahu in or about 1998 at the direction of his kupuna.

28. During the week of July 14, 2009, State law enforcement officers who were at Mauna Kea under the direction of Defendant Ige publicly agreed to allow all members of the public who have gathered at the Pu‘u Huluhulu pu‘uhonua, including Plaintiff, to remain there indefinitely.

29. On the morning of July 15, 2019, law enforcement officers, Department of Transportation personnel, and civilian contractors began preparations to facilitate the construction of the TMT, including (1) transporting heavy equipment and concrete barriers to block the shoulder lanes of Saddle Road; (2) erecting a gate and checkpoints on Mauna Kea Access Road; (3) and attempting to transport law enforcement and civilian personnel to dormitory facilities on Mauna Kea via the Mauna Kea Access Road.

30. In response, Plaintiff and other members of the public engaged in constitutionally-protected conduct, including, but not limited to, demonstrations of free speech, and the exercise of Native Hawaiian traditional and customary practices along the intersection.

31. No arrests were made on July 15, 2019.

32. Law enforcement, state employees, and telescope support staff were able to use Mauna Kea Access Road for access and egress to support facilities on Mauna Kea.

33. Though the kia‘i and the public maintained a presence at the intersection of Saddle Road and Mauna Kea Access Road on July 16, 2019, no arrests were made and/or attempted.

Law Enforcement Attempts Arrests For Only Two and a Half Hours Prior To Defendant Ige Issuing The TMT Proclamation

34. On July 17, 2019, law enforcement arrested approximately 33 nā kupuna, Native Hawaiian elders, alleged to have been obstructing the Mauna Kea Access Road just mauka of where the road intersects with Saddle Road. Law enforcement attempted arrests from the hours of 8:30 to 11:00 a.m.

35. All arrests occurred on or near the Mauna Kea Access Road, which was closed to public traffic at the time of the arrests.

36. No further arrests were attempted or made on July 17, 2019.

Defendant Ige Issues An Emergency Proclamation To Chill Constitutionally-Protected Conduct

37. On July 17, 2019, the office of Defendant Ige issued a proclamation (hereinafter the “TMT Proclamation”) pursuant to HRS sections 127A-12 and 127A-13 to facilitate the construction of the Thirty Meter Telescope on Mauna Kea.

38. A true and correct copy of the TMT Proclamation is attached hereto as Exhibit “A.”

39. The TMT Proclamation suspended the following statutes to the extent necessary to accomplish the intent of the TMT Proclamation:

- a. Chapter 46, Hawaii Revised Statutes, county organization and administration as any county ordinance, rule, regulation, law, or provision in any form applies to any county requirements that hinder, delay, or impede the purpose of this Proclamation;
- b. Section 78-13, Hawaii Revised Statutes, salary periods, to the extent necessary to allow state agencies to pay, as expeditiously as possible, members of the Hawaii National Guard who may be ordered into active service and deployed to the Hawaii County in response to this event.
- c. Section 127A-30, Hawaii Revised Statutes, rental or sale of essential commodities during a state of emergency; prohibition against price increases.
- d. Chapter 171, Hawaii’s Revised Statutes, public lands, management and disposition of.

40. The TMT Proclamation ordered the Attorney General, the State Sheriff, the Chief Law Enforcement Officer for the Department of Land and Natural Resources, and the Chief of the Hawai‘i Police Department to take “appropriate actions,” including the use of warning device systems (“LRAD”), the mobilization of personnel, imposing restrictions on civilian and pedestrian conduct, and mandatory evacuations to further the construction of the TMT.

41. The TMT Proclamation directs and authorizes the Adjutant General of the Hawai‘i National Guard to “activate such units of the Hawai‘i National Guard as may be necessary to assist and aid the civil authorities in averting any imminent public danger and threat.”

42. The TMT Proclamation does not prohibit troops of the Hawai‘i National Guard from arming themselves with firearms or other deadly weapons.

43. The TMT Proclamation applies to the following state lands TMKs: (3) 3-8-

001:002, 003, 004, 007, 009, 019, and 022; TMKs: (3) 4-4-015:001, 004,009,010, and 011; and TMKs: (3) 4-4-016:003, 006, and 010, and Saddle Road where it abuts these parcels (the “TMT Proclamation Area”).

44. The TMT Proclamation Area is made up of State ceded lands and Hawaiian Home lands.

The TMT Proclamation Is Intended To Assist The Development of a Private Project

45. The purpose of the TMT Proclamation is to facilitate the construction of the TMT.

46. The portion of the TMT Proclamation Area near Saddle Road is mostly pāhoehoe lava fields and brush. No construction is slated to occur in this area.

47. There are no public residences within the TMT Proclamation Area.

48. In the area surrounding the intersection of Mauna Kea Access Road and Saddle Road, there are no structures or other property of significant value.

49. At no time has there been a threat of harm to the population of Hawai‘i Island or to any member of the public caused by those exercising their constitutionally-protected conduct of free speech, religious worship, and traditional and customary practices.

50. In various press releases and interviews, Defendant Ige admits that the TMT Proclamation is intended to address the “protesters” currently located at the intersection of Mauna Kea Access Road and Saddle Road.

Plaintiff Kumu Paul Neves

51. Plaintiff is a respected Kumu Hula and holds Mauna Kea sacred and an essential part of his traditional and customary practices and beliefs. Plaintiff feels a deep familial connection to Mauna Kea. He believes that Mauna Kea is the center of our continued existence and protects us from harm, natural and unnatural, preserves our resources of water for today and tomorrow, and perpetuates the continued evolution of the Kanaka Hawai‘i culture.

52. Plaintiff is a member of the Royal Order of Kamehameha and, as part of the Order, he helped to establish the ‘ahu at Pu‘u Huluhulu and the pu‘uhonua located there.

53. Plaintiff has traditional and customary practices throughout Mauna Kea and in the area where the TMT is proposed to be built.

54. Plaintiff frequently and regularly engages in a pilgrimage to Mauna Kea from his home in Hilo as part of his traditional and customary practices and beliefs.

55. Plaintiff engages in prayer and ceremony throughout Mauna Kea, from Pu‘u

Huluhulu, to Hale Pōhaku (located approximately half way up Mauna Kea on Mauna Kea Access Road), and the summit area, including the site where the TMT is proposed to be built.

56. Plaintiff has maintained a presence at the Pu‘u Huluhulu pu‘uhonua and the intersection of Saddle Road and Mauna Kea Access Road since July 14, 2019.

57. Plaintiff has engaged in and intends to continue to engage in protected conduct including free speech, assembly, religious exercise, the right to move and travel, and Native Hawaiian traditional and customary practices in the TMT Proclamation Area.

58. The TMT Proclamation prohibits Plaintiff and others from exercising the rights of free speech, assembly, religious exercise, the right to move and travel, and Native Hawaiian traditional and customary practices in the TMT Proclamation Area.

59. The TMT Proclamation prohibits Plaintiff and others from accessing Mauna Kea north of Saddle Road, including Hale Pōhaku and the summit of Mauna Kea.

60. The TMT Proclamation will prevent Plaintiff and others from accessing the Pu‘u Huluhulu pu‘uhonua, or will chill them from attempting to access the Pu‘u Huluhulu pu‘uhonua for fear of being blocked in indefinitely or of being arrested.

61. Plaintiff, as a native Hawaiian, is personally affected by the disposition and use of ceded lands. Plaintiff has standing to enforce the State of Hawai‘i’s duty to manage ceded lands consistent with the highest fiduciary duties.

62. Plaintiff, as a native Hawaiian, is personally affected by the disposition and use of lands in the Hawaiian Home Lands trust. Plaintiff has standing to enforce the State of Hawai‘i’s duty to manage the Hawaiian Home Lands trust consistent with the highest fiduciary duties.

63. Plaintiff is directly affected by the TMT Proclamation.

64. Plaintiff has suffered and will continue to suffer immediate irreparable damage, harm, and injury each day the TMT Proclamation is allowed to stand. No amount of money can fix the irreparable damage the TMT Proclamation causes him.

Claims For Relief

COUNT 1

(Violations of Article XII §§ 4 and 7, and Article XVI, § 7 of the State Constitution)

1. Plaintiff hereby realleges and incorporates by reference all the above allegations.

2. Under Article XII Section 7 of the State Constitution, the State has an affirmative duty to protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes by Native Hawaiians.

3. Ancient Hawaiian tradition, custom, practice, and usage enjoy continued protection under HRS §1-1.

4. Plaintiff, a descendant of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, engages in traditional and customary practices for cultural and religious purposes, both of which are thwarted by the TMT Proclamation.

5. Other descendants of native Hawaiians have traditional and customary practices that are affected and/or chilled by the TMT Proclamation.

6. Defendant Ige “may not act without independently considering the effect of [government] actions on Hawaiian traditions and practices.” *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d. 1068 (2000).

7. Defendants must act to prevent “the loss of vital cultural resources and the interference with the exercise of native Hawaiian rights.” *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d. 1068 (2000).

8. Defendant Ige breached his affirmative duty to protect Native Hawaiian customary and traditional practices when he failed to consider the effect of his actions on Hawaiian traditions and practice prior to issuing the TMT Proclamation.

9. In 1959, when Hawaii was admitted into the Union, the ceded lands were transferred to the newly created state, subject to the public trust provisions set forth in § 5(f) of the Admission Act. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959).

10. Under § 5(f) of the Admission Act, the State of Hawai'i has a public trust duty to manage ceded lands in part “for the betterment of the conditions of native Hawaiians[.]”.

11. Under Article XII, § 4 of the State Constitution, state officials, including Defendant Ige and his agents and employees, have a fiduciary duty to hold ceded lands in accordance with the § 5(f) trust provisions,

12. In Article XVI, § 7, incorporating Article XII, § 4, the State affirmatively assumes the § 5(f) trust responsibilities and its affirmative duty to hold and manage ceded lands as a public trust for native Hawaiians and the general public.

13. Plaintiff Neves has a right to bring suit under the Hawaii Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust.

14. By issuing the emergency proclamation, Defendant Ige violated Article XII §§ 4 and 7, and Article XVI, Section 7 of the State Constitution.

15. Plaintiff Neves, as a cultural practitioner and as a citizen of the state, may bring suit to enforce his right to exercise his traditional and customary practices, and simultaneously to mandate compliance with the public trust duties of state officials over ceded lands at issue which unreasonably interfere with those practices.

COUNT 2

(TMT Proclamation Violates The Hawai'i State Constitution)

16. Plaintiff hereby realleges and incorporates by reference the above allegations.

17. The TMT Proclamation is a criminal or quasi-criminal enactment.

18. A criminal enactment is invalid for being vague or overbroad if it infringes on the constitutional rights of the public and reaches a substantial amount of constitutionally protected conduct.

19. The TMT Proclamation reaches a substantial amount of Plaintiff's and the public's constitutionally-protected conduct, including the freedom of speech, freedom of assembly, freedom of religion, the right to engage in traditional and customary Native Hawaiian practices, the freedom of movement, and other constitutionally-protected conduct.

20. Through its overbroad language and applicability, the TMT Proclamation creates an impermissible prior restraint on constitutionally-protected conduct.

21. The TMT Proclamation favors one form of speech over other speech and constitutionally-protected conduct.

22. The TMT Proclamation unlawfully infringes on the rights of Plaintiff and other Native Hawaiians to engage in traditional and customary practices, free speech, assembly, religious exercise, and other constitutionally-protected conduct on Mauna Kea.

23. The TMT Proclamation violates the due process clause of the Hawai'i State Constitution by failing to set forth adequate reasons for its issuance.

24. Plaintiff's and the public's constitutional rights do not disappear simply because it is alleged that there is an "emergency."

25. The TMT Proclamation is unconstitutional.

COUNT 3
(Violation of HRS Chapter 127A)

26. Plaintiff hereby realleges and incorporates by reference the above allegations.
27. HRS § 127A-14 allows Defendant Ige to declare the existence of a state of emergency by proclamation only in the event of an “emergency or disaster.”
28. “Emergency” is defined by Chapter 127A to mean any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property.
29. “Disaster” is defined by Chapter 127A to mean any emergency, or imminent threat thereof, which results or may likely result in loss of life or property and requires, or may require, assistance from other counties or states or from the federal government.
30. There is no basis for Defendant Ige to conclude that an emergency or disaster is now occurring or is threatened to occur in the TMT Proclamation Area.
31. The fact that the public is engaged in constitutionally-protected conduct in the TMT Proclamation Area is not an emergency or disaster as defined by Chapter 127A.
32. That some individuals may be obstructing the Mauna Kea Access Road, a right of way that is currently closed to the public, is not an emergency or disaster as defined by Chapter 127A.
33. Defendant Ige has exceeded the authority granted to him by Chapter 127A to the harm, injury, and loss suffered by Plaintiff.
34. Defendant Ige has failed to follow all required procedures necessary to issue an emergency proclamation.

PRAYER FOR RELIEF

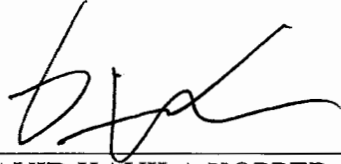
Wherefore, Plaintiff prays for relief as follows:

- A. Declare that Defendant Ige violated Article XII § 7 of the Constitution of the State of Hawai‘i.
- B. Declare that the TMT Proclamation is overbroad and/or violates the rights of free speech, religious worship, and movement.
- C. Declare that Defendant Ige violated HRS 127A.
- D. Declare the TMT Proclamation to be void.
- E. Issue temporary and permanent injunctive relief.

F. Grant Plaintiff his attorney's fees and costs, including attorney's fees pursuant to the private attorney general doctrine set forth in *In re: Water Use Permit Applications*, 96 Hawai'i 27, 25 P.3d 802 (2001).

G. Provide for such other and further relief as the Court shall deem just and proper.

DATED: Honolulu, Hawaii, July 18, 2019.

A handwritten signature in black ink, appearing to read 'DK', is written over a horizontal line.

DAVID KAULA KOPPER
Attorney for Plaintiff Paul Kevin Neves